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ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

Staff Memorandum

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AZ CORP COMMISSION
DOCKET CONTROL

2007 JUN -8 P 3:24

RECEIVED

DATE: June 8, 2007

JUN -8 2007

TO: The Commission

DOCKETED BY

NR

FROM: Safety Division, Railroad Safety Section

RE: **Union Pacific Railroad Company's unauthorized construction, modification and alteration of the at-grade crossing: Central Avenue in the town of Bowie, Arizona.**

BACKGROUND

On Friday, May 18, 2007, Safety Division Staff received a report stating Union Pacific Railroad (UP) had constructed a new main track through the Central Avenue at-grade crossing in Bowie, Arizona during the week of May 13th. Upon completion of the track construction, UP relocated warning devices (lights and gate arms) to include the newly constructed main track.

Upon receiving the report, Railroad Safety Section Supervisor, Brian Lehman, sent Inspectors from the Tucson office to verify the information. Photos taken by Inspectors confirmed track construction and warning device relocation. Mr. Lehman contacted UP's Public Projects Manager, James Smith to inform him that the Arizona Corporation Commission (ACC) Railroad Safety Staff had become aware of unauthorized construction. Mr. Smith stated that he was unaware of the construction at Central Avenue, and hurriedly ended the telephone conversation so that he could make contact with other UP staff to verify the information. Meanwhile, Safety Division Director, David Raber contacted UP's Director of Government Affairs, Chris Peterson, about the issue. Mr. Peterson confirmed the report later that day. Once confirmation of the unauthorized construction was received, Mr. Raber emailed the Commissioners, informing them of the situation and facts known at that time.

On Tuesday, May 22nd, a meeting was held between Safety Division Staff, ACC Legal Division Staff, UP officials and UP Legal Counsel at ACC offices to discuss UP's actions. In this meeting, Mr. Peterson stated that UP's actions were inadvertent and not intended to test the Commission's jurisdiction. He apologized for UP's actions; stating that a breakdown in communication within UP was the problem, and that UP construction crews believed all required approvals had been obtained. UP Director of Construction, David Orrell further explained measures that are being implemented to prevent a future occurrence. As explained by Mr. Orrell, those measures are to include increased interaction between the UP Engineering Division's Design and Construction Sections, along with participation by the UP Public Projects Manager during monthly construction

meetings. Mr. Peterson added that no trains or on-track equipment will be operated through the crossing, until formal approval is obtained from the ACC.

On Tuesday, May 29th, Brian Lehman and Railroad Safety Section Assistant Supervisor Chris Watson conducted an onsite inspection and testing of the relocated warning devices at the Central Avenue grade crossing. After performing all applicable tests, the warning devices were found working as intended. Staff took no exceptions to any Federal or Commission requirements pertaining to the operation of the warning devices.

On Thursday, May 31st, UP issued a formal letter to the ACC which: 1) explained the situation, 2) offered a written apology, 3) offered a self-imposed monetary penalty of \$2,000 per day pursuant to ACC Regulation R14-5-116, 4) indicated their intent to submit the crossing application and 5) provided information on how their processes are being improved to provide assurance that this situation does not occur again.

In reviewing the letter of May 31, 2007, Safety Division Staff has found information included in the letter to be factual and accurate, with the following exceptions or unconfirmed information:

- ✓ Page Two of the letter states, *"Union Pacific's contractor obtained the closure permit from Cochise County to close Central Avenue temporarily so that the second track could be installed through the crossing. Union Pacific's contractor obtained permission for the closure permit on May 11, 2007."*
 - Safety Division Staff has asked UP personnel on two occasions (May 22nd and June 1st) for copies of the closure permits and to date, have not received the copies.
 - Cochise County Office of Highway/Flood Plain Contract Superintendent, Ron Ellis, indicated that no closure permits were applied for or granted to UP or their contractor. When asked to explain this, Chris Peterson clarified in an email dated June 5th that, *"It was a railroad employee, and not our contractor, who obtained permission to close the Bowie crossing for the work on May 14. Our letter of May 31 indicated a permit was obtained, but Exhibit 1 (the timeline), indicates a contact was made by a UP employee and permission was granted. That contact was actually a series of verbal conversations. Exhibit 1 (the timeline) was a more accurate portrayal of the circumstance on this point."*
 - In a follow-up email to David Raber sent by UP Counsel on June 6th, it was noted that contact was made by phone on May 12th by a UP foreman to the Cochise County Sheriff's Office to inquire about steps necessary to close the crossing. The UP employee was directed to contact the Sheriff Dispatcher when construction work was to begin. The email further states that contact was made upon the onset of construction. This statement was confirmed by Safety Division Staff. The June 6 email also included a

revised Exhibit 1 Timeline to replace the initial Exhibit 1 Timeline included in the letter from UP dated May 31st.

- Conclusion of the Safety Division: UP likely made verbal contact with emergency service agencies in Cochise County, but did not obtain written or verbal permission from the road authority (Cochise County Office of Highway/Flood Plain) before closing the crossing.
- ✓ Page Two of the letter states that, *"Also on that date, Union Pacific's contractor contacted fire and ambulance services to notify them of the temporary closure of Central Avenue."* Safety Division Staff were unable to confirm this initially. Since then, UP Counsel provided an email dated June 6th which included a statement that telephone contact was made with the Cochise County Sheriff's Office by a UP foreman and subsequent contact was made with the Fire Chief in Willcox, Arizona. Specifically, UP stated, *"On May 12th at approximately 3:00 p.m. local time, Juan Olmos, system track foreman and a Union Pacific employee, contacted Mark Deny (sp?) at Cochise County (520-432-9500) to inquire about the steps necessary to close the crossing to perform the track work. Mr. Deny informed Mr. Olmos that he needed to contact the Cochise County Sheriff 911 Dispatcher (520-432-9501) in Willcox about the planned closure. Mr. Deny indicated that the Sheriff Dispatcher would contact other emergency services."* The email further goes on to state, *"On May 14th, Mr. Olmos contacted the 911 Dispatcher (name unknown), as previously instructed by Mr. Deny, to advise that Union Pacific was ready to close the Central Ave. crossing that morning. Mr. Olmos then contacted the acting Fire Chief at Willcox, whose last name is believed to be Florina (sp?). By the time Mr. Olmos called Ms. Florina, the 911 Dispatcher had already called her. Ms. Florina and Mr. Olmos held a pre-job briefing by phone to discuss plans for a detour to a public crossing approximately nine miles east during construction, plans to construct a temporary crossing at or near Central Avenue in the event of an emergency, and staging of a fire truck north of the crossing during the closure. As part of these arrangements, a front end loader was made available at Central Avenue during the closure for the purpose of placing fill material over the tracks in the event there was an emergency. The crossing was closed at approximately 08:15 hrs. and was reopened at approximately 14:30 hrs."*
 - The Cochise County Sheriff's Office employee cited in the email (Mark Denney) confirmed on June 8, 2007, that he was contacted by a UP employee on May 12th.
 - Safety Division Staff attempted to contact the Fire Chief in Willcox cited in the email. In doing so, Staff found that there is no acting Chief in Willcox by the name of Florina. Willcox Fire Department Staff indicated that the Fire Chief's name is Jake Weaver, and that this closure would have been a Cochise County or Bowie issue, not a Willcox issue.
 - Safety Division Staff attempted to contact the Bowie Volunteer Fire Department to confirm the emergency contingency plans. Staff felt that it was possible that UP's explanation mistakenly named Florina as the

Willcox Fire Chief, when perhaps she was the Bowie Fire Chief. Staff did reach an individual by the name of Florina Christiernsson at the Bowie Volunteer Fire Department on June 8th. Ms. Christiernsson is the Acting Fire Chief in Bowie and she confirmed that discussions did take place between her and UP regarding emergency response plans prior to and during the construction activity.

- Conclusion of the Safety Division: Although facts in the May 31 letter and subsequent email clarifications were not entirely accurate, Staff, through subsequent investigation, is certain that UP made contact with local emergency service personnel in the Bowie area prior to the start of construction through the crossing.
- ✓ Page Two of the letter states, *"During construction, emergency access was available approximately 0.6 miles to the east across a temporary construction crossing."*
 - While in Bowie on May 29th, Staff could not verify that the temporary crossing existed.
 - An email from UP Counsel received on June 6th confirmed that the statement in the May 31 letter was inaccurate. In fact, the temporary crossing 0.6 miles east of the crossing was used once before as a temporary crossing, however, it was not practical for use during the track construction project. Instead, it is noted that verbal plans were made between the UP foreman and the local Fire Department to ensure that emergency responders could provide services to individuals on the north side of the tracks if necessary. In addition, as noted above, the information provided by UP stated that, *"As part of these arrangements, a front end loader was made available at Central Avenue during the closure for the purpose of placing fill material over the tracks in the event there was an emergency."*
 - Safety Division Staff was able to verify the alternative arrangements for emergency responders with the Bowie Volunteer Fire Department on June 8, 2007.
 - Conclusion of the Safety Division: The statement in the May 31 letter that a temporary crossing existed 0.6 miles to the east of the Central Avenue crossing was inaccurate. However, it appears that UP Staff made alternative arrangements to provide emergency services to the north side of the tracks if necessary.

FINDINGS

After discussing and reviewing the incident with UP representatives, conducting an internal investigation, verifying crossing safety, and reviewing the letter from UP dated May 31, 2007, Safety Division Staff believe UP's unauthorized construction of the double track through Central Avenue in Bowie was a serious offense but was inadvertent.

Facts that support our opinion include:

- ✓ When initially informed of the violation, UP Projects Manager James Smith appeared to be genuinely startled and concerned about the report. As indicated earlier in the memo, Mr. Smith was quick to get off of the phone and investigate the issue immediately.
- ✓ When contacted by David Raber, UP Director of Government Affairs Chris Peterson offered immediate acceptance of and admission of UP's error, upon confirming the violation. He further indicated that UP management had taken immediate measures to assure that no freight traffic was carried on the tracks and contacted Commissioners within hours to offer meetings to discuss the mistake.
- ✓ UP offered timely public apology for the incident and mistake.
- ✓ UP began implementing immediate corrective measure within days of the incident, all of which were explained in the letter dated May 31, 2007.
- ✓ This was an isolated incident, and to the knowledge of Safety Division Staff, the first and only time that UP has entered into a crossing construction project without obtaining Commission approval in advance.
- ✓ Mr. Peterson, in a letter addressed to Commissioner Mayes dated May 31, 2007 indicated that the UP has not commenced construction on any of the remaining 42 crossings affected by the planned double-track project.
- ✓ Staff notes that UP offered a self-imposed penalty pursuant to A.A.C. R14-5-116 at the maximum under that provision of \$2,000 per day based on a single violation.
- ✓ Staff observes that UP could potentially be liable for multiple violations of Arizona statutes including but not limited to A.R.S. § 40-337. Accordingly, an appropriate penalty provision under Rule R14-5-116 is A.R.S. § 40-425. This statute provides a penalty range of \$100 – \$5,000 per violation of Arizona statutes. In addition it might also be asserted that the penalty provisions under A.R.S. § 40-424 could be applied cumulatively with any other penalty the Commission approves. Pursuant to this statute, the range of penalty would be \$100 - \$5,000 per violation per day.

RECOMMENATIONS

The ACC Safety Division recommends that:


- ✓ Union Pacific Railroad submit an application to the Commission for modification and alteration to the Central Avenue at-grade crossing. The application is to include traffic and environmental data pertinent to the crossing (Note: UP submitted application to the ACC on June 4, 2007).
- ✓ Union Pacific Railroad, consistent with its proposal to the Commission, pay a penalty of \$2,000 based on a single violation recurring daily because it appears from Staff's incident review that it was caused by inadvertence and miscommunication rather than a deliberate attempt to do so. Also, it appears to

Staff that this would be an expeditious and efficient resolution of this matter without resorting to an Order to Show Cause.

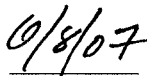
- ✓ The penalty would apply to the period beginning with the date that UP was positioned to build through the Bowie crossing, (May 8, 2007) up to and including the day the application was received by the ACC (June 4, 2007) for a total monetary penalty of \$56,000.
- ✓ Union Pacific Railroad provide up-dates to Safety Division Staff (via conference call or email) following UP's monthly construction conference calls throughout the duration the double track project. Staff recommends the following items be addressed through the up-date:
 - Where construction is on-going, including railroad milepost locations
 - Projected dates when construction will begin and end in that area
 - A starting and completion date for construction at affected grade crossings
 - Name of control point affected by construction
 - Status, in writing, of governmental requirements for each crossing, in a format to be jointly agreed upon by the ACC Safety Division and UP.

An email received from UP Counsel on June 6th indicates that UP agreed with the idea of conducting monthly update meetings regarding double track construction activities with the Safety Division Staff.

- ✓ The Commission consider approving the recommendations made in this Staff Report in an upcoming Special Open Meeting. However, should the Commission determine that a full evidentiary hearing would best serve the public interest, Staff recommends that the Commission refer the matter to the Hearing Division for further proceedings consistent with the Commission's directions.



David Raber, Director



Date